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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	Supreme Court No. R-10-0031 **Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court**

Introduction

In 1999, a report was submitted to the State Bar Board of Governors from the Lesbian and Gay Taskforce. Seven-seven percent of judges and attorneys in Arizona had heard disparaging remarks against gays and lesbians and forty-seven percent heard them in public areas of the courthouse. Thirty percent of Arizona judges and attorneys believed that gays and lesbians were discriminated against in the legal profession. Sixty percent of the judges said they did not know about statutes or cases prohibiting discrimination against lesbians and gays. Only thirteen percent knew of the ethical rule prohibiting discrimination on the basis of sexual orientation. Sixty-seven percent of judges

and attorneys and eighty percent of law students advocated passage of Arizona laws prohibiting discrimination on the basis of sexual orientation. Forty-three percent of judges and attorneys and fifty-four percent of law students thought the State Bar should adopt policies prohibiting discrimination on sexual orientation.

Ten years later, in 2009, two hundred Arizona attorneys signed a letter from Lambda Legal in favor of adding non-discrimination language to the Arizona oath indicating widespread support for the concept indicating that such discrimination has not ceased and still needs to be addressed. It is past time to update our ethical rules to include all classes of persons who face discrimination and to make non-discrimination an enforceable principle rather than an aspiration.

Equality is a basic principle of the Rule of Law.

A bedrock principle of the Rule of Law is that all people are entitled to equal representation under the law. From Henry II (1154 – 1180) who sent appointed judges to the provinces to consistently apply a uniform legal standard to all subjects, to the Magna Carta (1215) that insisted on individual rights, to the French Revolution (1789) lauding liberty, equality, fraternity, to our own

Declaration of Independence that states that all men are created equal, it has been clear that equality is the basis of the Rule of Law.

To be a lawyer is to hold a public trust. A cardinal principle for lawyers is that we have an obligation to our clients to represent them to the best of our ability. Not only do our ethical rules require it, but also equality would not be possible under the adversarial system if lawyers did not zealously represent their clients. Lawyers must put forward the best argument to ensure that all sides have a level playing field. With the power of the state or large corporations arrayed against a single individual, that individual has no possibility of a level playing field unless the lawyer advocates zealously and without bias or prejudice. The American Bar Association (ABA), which has developed models of regulatory law for the legal profession for over eighty years, has proscribed sexual orientation discrimination for over ten years.[1]

Domestically, such instruments as ethical codes, non-discrimination laws and due process formulas recognize the principles of equality. Internationally, equality is recognized by conventions such as the International Convention on Civil and Political Rights, The European, American and African Conventions

[1] *See* ABA, Center for Professional Responsibility, Model Rules of Professional Conduct, Rule 8.4, Comment ¶ 3 (hereafter, "Model Rule 8.4, Comment ¶ 3") (providing that it is misconduct prejudicial to the administration of justice to for an attorney to "knowingly manifest[] by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status"), available at <http://www.abanet.org/cpr/mrpc/ rule_8_4_comm. html>.

on Human Rights, the Convention on the Elimination of Discrimination Against Women signed by nearly country in the world, the Convention on the Elimination of Racial Discrimination, the Declaration on the Rights of Indigenous Peoples, and the adoption of the South African resolution A/HRC/17/L.9/Rev.1 on 17 June 2011 at the UN Human Rights Council in recognition of LGBT equality.

Often these principles are honored in the breach such as the widespread practice of slavery in the 16-20th centuries, many examples of genocide including against Native Americans, prohibition of civil rights to women, and violence and discrimination against the LGBT community. But lawyers have a long, proud and pivotal role, especially in the United States, in converting the theory of equality to a reality. Lawyers were instrumental in opposing slavery and indeed a lawyer president, Lincoln, issued the Emancipation Proclamation. Thurgood Marshall, a future Supreme Court justice, toiled for twenty years before *Brown v. Board of Education* ended official segregation in the U.S. Lawyers Crystal Eastman and Roger Baldwin formed the American Civil Liberties Union that works tirelessly to ensure that the guarantees of our civil liberties are not tarnished. Elizabeth Cady Stanton, daughter and wife of lawyers, worked for eighty years for women's right to vote. Alice Paul, another

lawyer, crafted and fought for the Equal Rights Amendment. The calling of a lawyer is to work for human rights – that includes non-discrimination.

The proposed rule is constitutional.

What the proposed rule prohibits is conduct not expression. In *Wisconsin v. Mitchell*, the U.S. Supreme Court held that hate crimes statutes do not implicate First Amendment freedoms because they target conduct, not expression. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993); *see also United States v. Stewart*, 65 F.3d 918, 930 (11th Cir. 1995) Non-discrimination laws do not impinge on the freedom of expression because it is conduct that is prohibited, not expression. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 628 (1984) ("acts of invidious discrimination . . . like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.") Thus, "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)

The court made clear in *Wisconsin v. Mitchell* that a law aimed at conduct that is unprotected by the First Amendment, e.g. non-discrimination, will be upheld. Especially when the rule is aimed at a desire to redress the

greater individual and societal harm inflicted by bias-inspired conduct, such as the rule at issue here, that is a sufficient explanation for the provision over and above mere disagreement with offenders' beliefs or biases. The court, one year after deciding *R.A.V. v. City of St. Paul,* restricted that case and stated that *R.A.V.* was explicitly directed at expression while *Mitchell* was directed at conduct. In the instant matter, the proposed rule specifically says to be in violation the lawyer must "knowingly manifest(s)" behavior – in other words, the rule is aimed at conduct not thought or expression and therefore does not violate the First Amendment.

ADF has misconstrued *R.A.V.* The main crux of the Court's argument was that the "fighting words" rationale used by the state could be applied only on proscribable conduct, and they had used it on nonproscribable conduct. Discrimination is proscribable conduct, and therefore the rationale of *R.A.V.* does not impact this matter.

In fact, what ADF is asking would violate *R.A.V.* because their proposal is underinclusive, addressing some offensive instances (discrimination based on race e.g.) and leaving other, equally offensive, ones (discrimination based on sexual orientation) alone. That is precisely what *R.A.V.* said cannot be done because that would clearly be viewpoint discrimination. Further, the court in

R.A.V. also explained that the state could regulate professions differently e.g. price advertising in one profession but not another because the danger or cost of fraud in that arena is more serious than in another. In this case, the danger or cost of discrimination in the legal profession is more serious than in another profession because as lawyers, we embody the Rule of Law and follow ethical rules in the best interest of our clients. In fact, Supreme Court Rule 41(h) prohibits lawyers from "reject[ing] for any consideration personal to [the lawyer] the cause of the defenseless or oppressed."

The defendant in *Mitchell* made the same argument as ADF that the statute was chilling on their free speech. The Court rejected that argument because it was too speculative. The court went on to say that if a person did in the future violate a law by their conduct, rules of evidence commonly do permit previous declarations in evidence to prove motive or intent.

Because the proposed rule addresses conduct not speech, because it addresses proscribable behavior i.e. discrimination and because the purpose is to ensure the Rule of Law and improve the administration of justice by making the precepts of equality reality, it is perfectly in line with constitutional principles both state and federal.

<u>Lawyers are obliged to enhance the administration of justice.</u>

ADF in their comments on 15 July 2011 suggest that lawyers should not act until the legislature does. But the legislature has made discrimination against these groups illegal in many different ways. [2] Current law even includes someone who has a felony and mental illness so perhaps we should extend the ethical rule to those categories as well. Even if the legislature has not acted on a specific category that does not hamper the court from finding that a given form of discrimination is wrongful. *Lans v. Mutual Life Insurance Co. of NY* (145 Ariz. 68, 699 P 2d 1299, 1985).

The Arizona Constitution is certainly not silent on the topic nor is it foreign to Arizona law. Section 2 Article 13 "Equal Privileges and Immunities" makes it clear that no law shall be enacted granting any class of citizens any more rights or privileges than any other. Section 2 Article 36 specifically names classes of persons who shall not be discriminated against in public employment, education or contracting.

Further, it is not the province of the legislature to regulate lawyers. The Arizona Supreme Court has recognized its authority in this area "since the early days of statehood." *Scheehle v. Justices of the Supreme Court of Ariz.,* 120 P.3d 1092, 1099 n. 8 (2005). The Court regulates by "promulgating rules" that

[2] ARS 20-448 life insurance, ARS 23-425 employees, ARS 3-3120 employees, ARS 36-506 hospitalization, ARS 41-1442 public accommodations, ARS 41-1465 age, ARS 41-1491.19 disability, ARS 41-

"further the administration of justice," and it exercises that function "pursuant to its own constitutional authority over the bench, the bar, and the procedures pertaining to them." *Id.* at 1099, 1100. As long as these rules are an "appropriate exercise of the court's constitutional authority" they are "valid even if they are not completely cohesive with related legislation." *Id.* at 1099. "Although the legislature may, by statute, regulate the practice of law, such regulation cannot be inconsistent with the mandates of this Court." Id.

To further the administration of justice and enhance the Rule of Law, lawyers must act to make equality under both the national and state constitutions a reality not just a talking point. This modification of the ethical rule is one step toward that goal.

The subjects of the proposed rule are clearly defined.

ADF claims that sexual orientation or gender identity is ambiguous. In fact, race is so ambiguous that the census now provides a mixed race category. In reality, race does not even exist. According to the U.S. Department of Energy Office of Science, Office of Biological and Environmental Research, Human Genome Program:

DNA studies do not indicate that separate classifiable subspecies (races)

1492 et seq public accommodation, ARS 41-1491 sale or rental, to name a few.

> exist within modern humans. While different genes for physical traits such as skin and hair color can be identified between individuals, no consistent patterns of genes across the human genome exist to distinguish one race from another. There also is no genetic basis for divisions of human ethnicity. People who have lived in the same geographic region for many generations may have some alleles in common, but no allele will be found in all members of one population and in no members of any other.

Yet we have many laws, regulations, cases and contracts that prohibit racial discrimination.

Sex or gender is also ambiguous. Some cultures have more than two sexes. The term third sex has been used to describe Hijras of India, Bangladesh and Pakistan who have gained legal identity, Fa'afafine of Polynesia, and Sworn virgins of the Balkans, among others, and is also used by many of such groups and individuals to describe themselves. In Arizona, the Navajo consider two-spirited persons a third gender. Thus our Arizona heritage would require that we include a third gender. Yet we have many laws, regulations, cases and contracts that prohibit sex and gender discrimination.

The Supreme Court has had no problem understanding what sexual orientation is.[3] Scholars have published many academic legal articles about sexual orientation and gender identity.[4] In fact religious identity is the most ambiguous of all – it's merely the result of subjective self-identification.

Regardless, due process does not "require 'impossible standards' of clarity," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983), and the constitutional prohibition against excessive vagueness does not invalidate every statute that could have been crafted with greater precision, "'for in most English words and phrases there lurk uncertainties.'" *McSherry v. Block,* 880 F.2d 1049, 1054 (9th Cir.1989) (quoting *Rose v. Locke,* 423 U.S. 48, 50 (1975) (internal citation omitted)); *see also Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language."); *United States v. Gilbert,* 813 F.2d 1523, 1530 12

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[3] *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 581 (2003) (O'Connor, J., concurring in the judgment) (describing invalidated Texas sodomy statute as criminalizing only sodomy engaged in by those with a "same-sex sexual orientation"); *Romer v. Evans,* 517 U.S. 620 (1996) (overturning a state constitution amendment that repealed and banned all anti-discrimination measures based on sexual orientation); *Hernandez-Montiel v. INS,* 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them."), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005).

[4] *See, e.g.,* Chai Feldblum, *Sexual Orientation, Morality and the Law: Devlin Revisited,* 57 U. Pitt. L. Rev. 237 (1996); *Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification,* 98 Harv. L. Rev. 1285 (1985); Jennifer Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 5 Colum. J. Gender & L. 90 (2006); Fatima Mohyuddin, *United States Asylum Law in the Context of Sexual Orientation and Gender Identity: Justice for the Transgendered?,* 12 Hastings Women's L.J. 387 (2001).

(9th Cir. 1987), *overruled on other grounds as stated in United States v. Hanna,* 293 F.3d 1080, 1088 n.5 (9th Cir. 2002) ("'Words inevitably contain germs of uncertainty.'" (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 608 (1973))). Rather, to satisfy due process, a statute simply "must be sufficiently clear so as to allow persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998) (internal quotation marks omitted).

For over 200 years, our jurisprudence has not manifested difficulty understanding the meaning of race, religion, sex, age, national origin and more recently gender, socioeconomic status, disability and sexual orientation. We can cope with "gender identity." Words are lawyer's tools – that's how the law evolves.

The proposed rule maintains attorney independence.

No attorney is forced to represent a client with whom they fundamentally disagree. In fact, ER 1.16(b)(4) provides that a lawyer shall not represent a client or shall withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ADFs reliance on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 238, 132 L.

Ed. 2d 487 (1995) is completely misplaced because Arizona lawyers are protected by ER 1.16(b)(4). An "opt out" provision already exists.

Reliance on *Legal Services Corporation v. Velazquez et al* 531 U.S. 533 (2001) is also inapposite because that case dealt with the freedom of attorneys to represent clients without state control over which issues they could or could not argue. That is not the issue here as evidenced by the plain language of the rule (with the sole exception …) and the protections of ER 1.16(b)(4).

The language of the rule's exception to allow legitimate advocacy "when such classification is an issue in the proceeding" could be changed to "in the course of representation" to make it clear that regardless of the form of representation, (litigation, lobbying, transactional) no attorney has to advocate a position s/he considers repugnant or with which they have a fundamental disagreement.

Conclusion

The comments of ADF echo earlier arguments against some of these protected groups based on stereotypes and prejudices. It was claimed that Negroes had smaller brains to justify excluding them from voting. It was claimed that if women ran, their uterus would fall and render them sterile to justify excluding them from sports. Those who seek to indulge their own

prejudices will find a rationale no matter how farfetched. The evolution of the law in this country has been toward a more inclusive society as we recognize the truth of and seek to make real the words of the Declaration of Independence.

To suggest that certain persons are not entitled to equal rights is to return to the *Dred Scott* decision in which Negroes were said to have no rights that white men needed to follow. To suggest that prohibiting discrimination is unconstitutional is to return to the *Plessy v. Ferguson* (163 U.S 537, 559 (1896)) decision in which arbitrary distinctions were justified. Those theories, like those cases, are long discredited and stand as an emblem of shame on our legal system.

As attorneys concerned about human rights, the below signed attorneys, non-attorney residents of Arizona and legal and human rights organizations express their support for the petition from the State Bar and ask that it be adopted.

Respectfully submitted this date: 28 October 2011.

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Electronic copy filed with the
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On 28 October 2011